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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 32

PACIFIC GAS AND ELECTRIC COMPANY

Respondents,

and Case No. 32-CA-213182

ENGINEERS AND SCIENTISTS OF CALIFORNIA, LOCAL 20, IFPTE, AFL-CIO & CLC

Union.

PETITIONER'S OPPOSITION TO REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

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I. INTRODUCTION

On January 17, 2018, the Engineers and Scientists of California, Local 20, IFPTE, AFL-CIO & CLC ("Union") filed an *Armour-Globe* Representation Petition with Region 32 of the National Labor Relations Board. In its Petition, the Union asked for an election to determine whether the 36 IT Project Managers in Pacific Gas and Electric's "Infrastructure and Operations Program and Project Delivery Department" ("I&O") desired to be included in the Union's existing "Professional & Technical Unit, comprised of approximately 3300 employees." The unit, which originated in 1952, contains some but not all of the professional and technical employees employed by the Employer.

PG&E filed a Statement of Position on January 26, 2018 disputing the petitioned-for unit. According to the Company, under the standard set forth in *PCC Structurals, Inc.*, 365 NLRB No. 60 (Dec. 15, 2017) ("*PCC Structurals*"), the voting unit should include all IT Project Managers, regardless of their separate department placement and separate supervisory structure. PG&E did not dispute, at any point in time, that an *Armour-Globe* election in some voting unit was appropriate.

On January 29, 2018, a hearing was held at Region 32 before Hearing Officer Noah Garber. The Union called as witnesses two IT Project Managers from the petitioned-for unit, Albert Badalyan and Marco Luna, and two PG&E employees from the existing unit – one Transmission Line Project Manager, Adam Arrigoni, who had been an IT Project Manager previously and one Telecomm Engineer, Joaquin Moreno. PG&E called one witness, Chris Vana, Director of the 90 plus employees in the Infrastructure Operations Project Program and Project Delivery Department. Neither party elected to file a closing brief.

The Regional Director issued her Decision on February 27, 2018 directing an *Armour-*

Globe self-determination election in the petitioned-for unit via mail ballot. Votes were tallied on March 28, 2018. A majority of the ballots cast were in favor of joining the existing Professional & Technical bargaining unit. No objections were filed. Region 32 issued a Certification of Representative on April 6, 2018.

Following this, on April 19, PG&E filed a Request for Review of Regional Director Hardy-Mahoney's Decision and Direction of Election and Certification of Representative. In it, the Employer argues that the long-standing, well accepted analysis applied in *Armour-Globe* cases should be modified and the analysis in *PCC Structurals* should be used.

However, under Section 102.67(d) of the Board's Rules and Regulations, a request for review will only be granted where "compelling reasons" exist. No compelling reasons exist here. The Regional Director relied on well-established law that requires the Board to use an *Armour-Globe* analysis in self-determination elections rather than a traditional community of interest analysis or industry specific presumption. Furthermore, even under the traditional community of interest analysis set forth in *PCC Structurals*, the IT Project Managers ("PMs") the Employer wishes to add lack the fundamental community of interest factors: shared supervision, interchange and functional integration.

II. STATEMENT OF FACTS

The Union hereby adopts the Statement of Facts included in Regional Director Valerie Hardy-Mahoney's Decision and Direction of Election in case 32-RC-213182.

III. ARGUMENT

A. The Regional Director Correctly Applied Long-Standing *Armour-Globe* Case Law in Holding that *PCC Structurals* Did Not Modify the Test for Self-Determination Elections.

An *Armour-Globe* self-determination election permits employees sharing a community of interest with an already represented unit of employees to vote whether to join that unit. *Globe*

Machine & Stamping Co., 3 NLRB 294 (1937); *Armour & Co.*, 40 NLRB 1333 (1942). Given the nature of an *Armour-Globe* election, there need be "no separate finding that the group of employees who [a]re voting to join a unit [i]s, by itself an appropriate unit." *NLRB v. Raytheon Co.*, 918 F.2d 249, 252 (1st Cir. 1990). Indeed, an uninterrupted line of Board decisions dating back to the 1940s holds that employees who would not on their own comprise an appropriate unit for collective bargaining are entitled to a self-determination election to determine whether they should be added to an existing bargaining unit. *E.g., Maryland Drydock Co*., 50 N.L.R.B. 363 (1943) (self-determination proper even though Board found that voting unit was not appropriate by itself); *Great Lakes Pipe Line Co.*, 92 N.L.R.B. 583, 585-86 & fn. 7 (1950) (rejecting contention that election may be held only in group which would constitute separate appropriate unit); *Lorillard Division of Loews Theatres*, 219 N.L.R.B. 590 (1975) (employees found not to be a separate appropriate unit, but granted opportunity to join existing unit through a self-determination election); *Kansas City Terminal Elevator Co.*, 269 N.L.R.B. 350, 351-52 (1984) (union represented employees at one of two elevators; Board found that the other elevator was not a separate appropriate unit, but allowed those employees to vote to join the existing unit or remain unrepresented).

When considering whether to conduct a self-determination election to allow unrepresented employees to join an existing bargaining unit, the Board looks at the two factors set forth in *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990): (1) "the extent to which the employees to be included share a community of interest with the unit employees," and (2) "whether the employees to be added constitute an identifiable, distinct segment so as to constitute an appropriate voting group." The second prong of the test seeks to avoid the addition of a "fragmentary group" that constitutes "an arbitrary segment of the unrepresented employees." *Minneapolis-Honeywell*

Regulator Co., 116 NLRB 1324, 1328 (1956); *Capital Cities Broadcasting Corp.*, 194 NLRB 1063 (1972). The second prong also seeks "to prevent injustice being done to minority groups by gerrymandering practices which would require the arbitrary inclusion of such groups in a larger unit wherein they would have no effective voice to secure the benefits of collective bargaining." *Great Lakes Pipe Line Co*, 92 NLRB 583, 585 (1950).

A different body of Board law applies to determine whether employees properly comprise a new separate unit for collective bargaining. *See generally PCC Structurals*, 356 NLRB No. 160; *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) (overruled by *PCC Structurals*). In *PCC Structurals*, the Board overruled *Specialty Healthcar*e, and "reinstat[ed] the traditional community of interest standard as articulated in, *e.g.*, *United Operations*, 338 NLRB 123 (2002)." *PCC Structurals*, slip op. at 1. The Board explained that this test will "determine whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit." *Id.* at 7.

PG&E claims that the Regional Director should have applied *PCC Structural*s to the self-determination election in this case. But, nothing in *PCC Structurals* suggests that the Board was altering or even commenting on the well-settled *Warner-Lambert* test for self-determination elections.

PCC Structurals did not address self-determination elections and the language of the decision indicates that the Board did not intend its decision to address them. Throughout the decision, the Board discusses the standard and case-law for establishing a "separate unit." *E.g.*, *PCC Structurals*, slip op. at 1, 7 (emphasis added). This focus is even apparent in the quotations that PG&E cites in its Request for Review. *E.g.*, Request for Review, at 10-11. A self-

determination election case like this one does not address the creation of a separate unit. In a self-determination case, the separate unit already exists. Indeed, the separate Local 20 unit at PG&E has existed for more than fifty years. The only question is whether the petitioned-for group of employees should be added to the existing separate unit.

Specialty Healthcare, the case the Board in *PCC Structurals* overruled, did not apply to self-determination elections. The Regional Director correctly noted that in *Republic Services of Southern Nevada*, 365 NLRB No. 145, slip op. at 1, fn. 1 (Oct. 30, 2017), the Board rejected a party's attempt to apply *Speciality Healthcare* in a self-determination context. *Id.* (pointing out that Specialty Healthcare neither involved a self-determination election nor "purport[ed] to change the Board's longstanding standard for determining whether a self-determination election is appropriate."). A unanimous Board in *Kaiser Foundation Hospitals*, Case No. 20-RC-188438, 2017 WL 2179707 (May 17, 2017) reached the same result. *Id.*, slip op. at 1, fn. 1 (Members Miscimarra, Pearce and McFerran agreeing that *Specaility Healthcare* "did not purport to change the Board's longstanding standard for determining whether a self-determination election is appropriate"). *PCC Structurals* cannot be read to sweep in self-determination elections *sub silentio*.

The Board's rationale for overruling *Specialty Healthcar*e also confirms that *PCC Structurals* does not apply to self-determination elections. The Board grounded its analysis in the language § 9 of the Act, which empowers the Board to determine what is an "'appropriate unit'" for "'collective bargaining.'" *PCC Structurals*, slip op. at 3-4 (quoting § 9(a)). In a self-determination election, the Board is not tasked with deciding whether the petitioned-for employees constitute an appropriate unit for collective bargaining. Indeed, as the authorities cited above show, a self-determination election may be granted even if the added employees are not themselves

an appropriate unit for collective bargaining. *E.g.*, *Maryland Drydock Co.*, 50 N.L.R.B. 363 and cases cited *supra*.

Unable to find support for its position in the Board's analysis, PG&E is left hanging its argument on a few words in the *PCC Structurals* decision where the Board discussed the standard it would apply "in each case." PG&E says the Board should clarify whether by "each case," the Board meant to include self-determination elections. This is too slim a reed given the Board's analysis in the decision and in other authorities cited above.

B. The Board Should Deny Review Because Even Under the Analysis in *PCC Structurals, Inc.*, the PMs in the Security and Business Technology Departments Are Properly Excluded.

Even if the Board were inclined to apply the *PCC Structurals* test to a self-determination election, the Regional Director's decision would have to be upheld, making this case a poor candidate for review. The interests of the excluded IT PMs in the Security and Business Technology departments are sufficiently distinct from the petitioned-for IT PMs in I&O and the existing unit that exclusion is appropriate. The excluded and petitioned-for groups have distinct supervision, no significant interchange, no functional integration and distinct job duties, which are the key factors required to make exclusion appropriate under the *PCC Structurals'* traditional community of interest test. *Id.*, slip op. at 11 (quoting *United Operations*, 338 NLRB at 123).

The petitioned-for IT PMs in I&O manage construction projects involving large scale installation of telecommunications hardware. They are spread geographically throughout PG&E's system which covers most of Northern and Central California down through Bakersfield. Their job requires them to regularly field jobs in both urban and very rural areas. It also requires them to enter the dangerous locations where the telecommunications hardware is to be installed e.g. a substation. They are supervised by four field area supervisors who are managed by two managers, Steven Lal and Sara Von Shilling. UX 5. Lal and Von Shilling report up to Director Vana. I&O

IT PMs attend the same department specific trainings, all hands meetings and receive the same department emails updating them about the organization. UX 1, UX 3.

1. The Employer essentially concedes that the Petitioned-for IT PMs share a community of interest with the existing unit and with each other.

The Regional Director found that the petitioned-for I&O PMs share a community of interest with the existing unit and the Employer essentially concedes that this was correct. *See* Request for Review at 10, fn. 6 ("PG&E has never disputed that IT Project Managers share some community of interest with the employees in the existing unit."). The I&O PMs most frequently interact with each other, Union Telecommunications Engineers, Union Transmission Line and Substation PMs and Union Drafters. The management of their projects requires regular communication with each of these classifications. The Employer did not dispute that the level of functional integration between I&O PMs and these bargaining unit members is significant.

Nor does the Employer dispute that there is frequent temporary interchange within the I&O PMs– something Director Vana admitted—as well as permanent interchange. I&O PMs in fact share and trade off projects within the department. Perhaps more importantly, there is significant permanent interchange between the I&O IT PMs and the bargaining unit. Since 2013, four I&O IT PMs have moved into bargaining unit positions and two bargaining unit employees have moved into I&O IT PM. UX 10.

2. The IT PMs in Security and Business Technology are appropriately excluded.

Contrary to what the Employer claims, the PMs in Security and Business Technology have a sufficiently distinct community of interest from the I&O PMs and from the existing unit that the PMs in Security and Business Technology are properly excluded under the *PCC Structurals* test. The record reveals:

- **No Shared Supervision**

None of the four I&O Field Area supervisors supervise the excluded IT PMs from the Security or Business Technology Departments. Neither Manager Von Shilling, Manager Lal or Director Vana supervise IT PMs from the Security or Business Technology Departments.

- **Zero or One Instance of Interchange**

If there has ever been any interchange between I&O and Security or Business Technology, it is a single instance. Not a single IT PM from Security or Business Technology testified. Director Vana testified that Mai Tuyen-Calapini had gone from I&O to Security but he did not provide details on timing and this testimony was not corroborated.

- **Zero Functional Integration**

Current IT PMs testified that there is no interaction between themselves and IT PMs in Security or Business Technology. Former IT PM Adam Arrigoni testified to the same. Not only do they not interact with IT PMs in these other departments, they do not know who they are. They do not work in the same locations. In other words, the testimony provided by the IT PMs showed zero functional integration. Director Vana gave broad testimony of interaction on particular projects across departments, but he failed to name specific PMs and his testimony was not corroborated by testimony or documents.

- **No Evidence of Shared Duties**

As stated above, the petitioned-for IT PMs in I&O manage the large scale installation of telecommunications hardware. In order to do that, they go out to field job sites, engage with telecommunications engineers and drafters, walk down jobs, ask for status updates and try to bring these jobs to completion. No evidence was provided to show the day in and day out duties of IT PMs in Security or Business Technology. Director Vana testified about how all PMs generally

manage scope, schedule and budget for a project. However, he did not detail the projects of a Security or Business Technology PM and there is simply no evidence that they share the same duties.

Thus, even if *PCC Structurals* applied, the PMs in Security and Business Technology would have been properly excluded. *United Operations*, 338 NLRB No. 18, slip op. at 2-4 (2002) (group properly excluded where job duties minimally overlapped with those of the petitioned-for unit, there was minimal interchange and some shared terms and conditions of employment, but there was no significant functional integration or contact and distinct supervision).

The cases cited by PG&E are inapposite and pre-date *Warner-Lambert*. In *Capital Cities Broadcasting Corp.*, 194 NLRB 1063, 1063-64 (1972), the petition for a self-determination election was dismissed because the petitioned-for artists did not share a community of interest with each other or with the existing unit. The artists worked in different departments from each other and had different supervisors. The artists also had different supervisors from the represented employees and did not significantly interact with them. Here, the I&O PMs all work in the same department under the same supervisors and the Employer concedes that they share a community interest with the represented employees. *See, e.g.*, Request for Review, at 10. In *Minneapolis-Honeywell Regulator Co.*, 116 NLRB 1324, 1327 (1956) also, the petitioned-for unit lacked a community of interest with those in the existing unit – circumstances not presented here.

C. The Regional Director Applied Well-Established Law in Rejecting the Rebuttable Utility Industry System-Wide Presumption in This *Armour-Globe* Election.

PG&E argues that the Regional Director's well-reasoned decision to reject the rebuttable system-wide utility industry presumption was wrong. However, the Regional Director gave several sound reasons for refusing to apply the presumption, including that "the presumption that a system-wide unit is appropriate does not apply in the context of a self-determination election

involving an existing non-conforming unit." The precedent in support of this reasoning is extensive.

1. The Regional Director Correctly Found that Self-Determination Elections Do Not Give Rise to the Systemwide Unit Presumption Because They Do Not Create a New Unit or Lead to Proliferation.

It is axiomtic that *Armour-Globe* self-determination elections are different from standard representation elections and, as a result, necessarily lead to a deviation from otherwise established case law on unit appropriateness. That is because, as discussed above, the petition in an *Armour-Globe* self-determination election seeks to add workers to an already existing unit and does not establish a new unit.

PG&E argues that the Regional Director wrongly applied the law when she found the system-wide presumption for utility units inapplicable to this case. The system-wide utility presumption for establishing a new unit is premised on concern for the uninterrupted provision of vital services to the public. *Baltimore Gas & Electric Co.*, 206 NLRB 199, 201 (1973). The Employer concedes, as it must, that underlying *Baltimore Gas & Electric Co.* and its progeny is the concern that an increase in the number of bargaining units "'could lead to an increase in the number of potential labor disputes and work stoppages.'" Meanwhile, the smaller the number of bargaining units, the smaller the risk that a labor dispute will lead to an interruption. Request for Review, at 23 (quoting *Alyeska Pipeline*, 348 NLRB 808, 812 (2006)). But this consideration is not present in self-determination elections because the number of bargaining units remains unchanged. Indeed, a successful *Armour-Globe* election is more likely to increase stability and labor peace by putting more employees under the same bargaining umbrella.

Thus, under established law which the Regional Director followed, the Board has consistently found systemwide presumptions inapplicable to *Armour-Globe* elections. In elections for new units in the healthcare context, the Board applies a systemwide presumption established

by regulation for the same reasons. This presents no bar to an *Armour-Globe* election. As the Board explained in *St. Vincent Charity Medical Center*, 357 NLRB 854, "an *Armour–Globe* self-determination election ... undeniably avoids any proliferation of units, much less undue proliferation, because it does not result in the creation of and election in a separate, additional unit." *St. Vincent*, 357 NLRB at 855. Instead, "an *Armour–Globe* election permits employees sharing a community of interest with an already represented unit of employees to vote whether they wish to be added to the existing unit." *Id.* In this respect, the self-determination election "further[s] the petitioned-for employees' interest in obtaining representation while avoiding any undue proliferation of units," the principal concern of the NLRB's system-wide presumptions. *Id.*

In *Rush University Medical Center*, 833 F.3d 202 (2016), *affirming* 362 NLRB No. 23 (2015), the D.C. Circuit upheld the Board's finding that the health care regulations do not apply in self-determination elections where a petitioner seeks to add some but not all of the unrepresented employees in a particular standardized unit. The Board reasoned and the court agreed that "the addition of employees to an already existing unit—unlike the creation of a new unit—necessarily keeps the number of bargaining units constant." *Id.* at 204.

PG&E claims that the Board should accept review because failure to apply the systemwide presumption in a self-determination election "would allow unions to slice and dice public utility's employee classifications inconsistent with the teachings of *Baltimore Gas & Electric* and its progeny." *See* Request for Review, at 24. The authorities above show that the Employer's argument is not only overdramatic; it is plain wrong. There was one bargaining unit before Local 20 filed its petition and there is still only one bargaining unit today.

2. PG&E Does Not Challenge the Regional Director's Conclusion that the System-Wide Utility Industry Presumption Does Not Apply Because There is An Existing, Fragmented Unit.

As set forth in the Regional Director's Decision, the unit to which the IT PMs in I&O have

been added is a unit that was certified in 1952 and contains some but not all of the technical and professional employees at PG&E systemwide. Over the past 60 years, many additions to the original unit have been made by various means including voluntary recognition, Board elections and card check. With each of these additions, the parties have continued to add some, but not all of the technical and/or professional employees employed by PG&E systemwide. The Employer has never objected to this fragmentation. Even now, PG&E does not propose fixing the fragmentation as the unit still would not be systemwide even if all of the PMs in the IT Department were added, as PG&E urges.

As an independent reason for finding that the systemwide presumption did not apply, the Regional Director relied on this fragmentation – fragmentation that adding the PMs in the Security and Business Technology Departments would not fix. DD&E, at 7 & fn. 5. PG&E ignores this rationale without comment. On this basis alone, PG&E's Request for Review fails.

In any event, the Regional Director was correct in her analysis of the law. "[T]he general rule in favor of systemwide units at public utilities has not operated as an absolute prohibition of smaller units." *Peco Energy Co.*, 322 NLRB 1074, 1079–80 (1997). In *Arizona Public Service Co.*, 310 NLRB 477 (1993), as here, the parties had a history of organizing groups of workers at a utility in a piecemeal fashion. Based on this history, the Board rejected the employer's argument that an election was only proper in a unit consisting of all the unrepresented employees. The Board affirmed the Regional Director's direction of an election in a single classification of unrepresented employees at one facility even though it would not result in a systemwide unit. *Id.* at 486-87.

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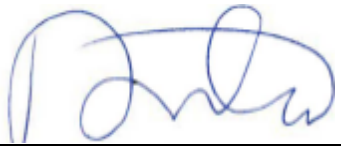
IV. CONCLUSION

For the foregoing reasons, the Request for Review should be promptly denied.

Dated: April 26, 2018

Respectfully submitted,

By: 

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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years old and not a party to the within action; my business address is 1188 Franklin Street, Suite 201, San Francisco, CA 94109. On **April 26, 2018**, I served a true and accurate copy of the foregoing **PETITIONER'S OPPOSITION TO REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION** on all interested parties in this action as follows:

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I declare under the penalty of perjury under the laws of the State of California and the United States that the above is true and correct.

Executed on **April 26, 2018** at San Francisco, California.